No. 07-1377

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

ALLEN HARMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

PETITIONER'S REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA,
Counsel of Record
TARA STEELEY
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4674
Facsimile: (415) 554-4747
E-Mail: vince.chhabria@sfgov.org

Attorneys for Petitioner City and County of San Francisco

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OR CALL COLLECT (402) 342-2831

1. Contrary to Respondent's assertions, the City does not ask this Court to adopt the rule already rejected in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986). In *Riverside*, the petitioners argued that fees in civil rights cases should be limited to one-third of the damages recovered, analogizing to contingency fee arrangements in standard tort cases. *Id.* at 574. Justice Brennan's plurality opinion rejected this limitation, as did Justice Powell's concurrence. Those opinions also rejected the suggestion that fees be strictly limited to the amount of damages recovered.

The City does not propose that the Court revisit these questions. Rather, the City seeks review so this Court can instruct appellate courts that there is a *presumption* against fee awards that, like this one, are grossly disproportionate to damages recovered. That is the approach Justice Powell effectively took in his concurrence in *Riverside*. *See id.* at 581, 586 n. 3 (Powell, J., concurring). A more formal presumption against disproportionate fee awards is therefore in no way contrary to *Riverside*; rather, it is a logical outgrowth of Justice Powell's controlling opinion in that case.

Unfortunately, many courts have rejected or ignored Justice Powell's approach. Some have explicitly expressed "doubts about Justice Powell's statement that only the rare case justifies disproportionate fee awards" and have concluded instead that "many if not most § 1983 cases" should "justify a 'disproportionate'

fee award." *Cunningham v. City of McKeesport*, 807 F.2d 49, 54 (3d Cir. 1986); *see also Northeast Women's Center v. McMonagle*, 889 F.2d 466, 472-73 (3d Cir. 1989). Other courts have simply ignored Justice Powell's reasoning and countenanced disproportionate fee awards based solely on the reasoning of Justice Brennan's plurality opinion. *Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir. 1996) (holding district court erred in reducing fee request that was 8 times higher than damages based on proportionality); *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005) (holding district court erred by reducing attorneys' fee request 30 times higher than damages recovery based on the "perceived disproportionality" between attorneys' fees and damages); *Davis v. Southeastern Penn. Trans. Auth.*, 924 F.2d 51 (3d Cir. 1991) (holding district court erred in reducing fee award 11 times higher than damages because "it is not permissible for a trial judge to make a reduction in the attorney's fee award solely on the basis of proportionality"); *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988) ("The district court should not have reduced the attorney's fees simply because the damage award was small.").

By establishing a presumption against disproportionate fee awards similar to the standard applied in cases such as *Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999), *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998), *Corder v. Brown*, 25 F.3d 833 (9th Cir. 1994) and *McGinnis v. Kentucky Fried Chicken of*

California, 51 F.3d 805 (9th Cir. 1994). This Court can stem the tide of increasingly large awards while preserving the flexibility necessary to accommodate the truly rare cases that warrant disproportionate fees. The Court should grant the petition to foster consistency among the lower courts on this issue – a consistency that unfortunately did not develop as a result of Justice Powell's opinion.

2. Respondent also asserts that the petition should be denied because there is no appellate decision squarely at odds with the opinion below given the fact-bound nature of the case. But all cases involving attorneys' fees are fact-bound. Respondent's logic would thus effectively immunize all fee awards from review by this Court, and prevent the Court from providing needed guidance in this area of the law. The lack of a square circuit split and the fact-based nature of damage awards did not prevent this Court from providing guidance concerning the proportionality of punitive damages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (review granted to "help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards'") (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)). Just as guidance was required in that case to curb runaway punitive damages awards, this Court should take this opportunity to control excessive fee awards.

3. Finally, in an effort to create the impression that this case presents a poor vehicle by which to

provide guidance to the lower courts, Respondent makes a number of distracting and inaccurate factual assertions. For example, he contends he did not reject a $25,000 settlement offer from the City on the eve of trial, even though the California Court of Appeal explicitly found that he did. Pet. App. 103, 110. He contends the verdict against the City achieved a major change in San Francisco's overall employment practices, even though the Court of Appeal held it did not. Pet. App. 140-42. However, this Court need not resolve these alleged "factual disputes" to hold what the City here asks it to hold: that there is a presumption against grossly disproportionate fee awards, and that when appellate courts are reviewing such awards, they should not apply the ultra-deferential "shocks the conscience" standard that the Court of Appeal applied here. Pet. App. 34. Should the Court grant the petition and ultimately agree with the City on this point, it need only remand the case for further consideration in light of its opinion. And it is difficult to imagine a better vehicle for addressing grossly disproportionate fee awards than a case where the plaintiff received a windfall of more than $1.1 million in fees despite recovering less than $31,000 in damages and failing entirely to obtain the requested injunctive relief.

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Counsel of Record
TARA STEELEY
Deputy City Attorneys

Attorneys for Petitioner
City And County of San Francisco